No. 92-1438

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEO HAVILAND,

Petitioner,

—v.—

J. ARON & COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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April 1, 1993

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether injury from a predicate act is an essential element of a RICO conspiracy claim under 18 U.S.C. § 1962(d)?

2. Whether employees discharged for refusing to participate in, or for "blowing the whistle" on, an allegedly fraudulent scheme directed at others have standing to bring RICO claims under 18 U.S.C. § 1962(c)?

RULE 29.1 STATEMENT

The parent company of respondent J. Aron & Company is The Goldman Sachs Group, L.P. The only subsidiary of J. Aron & Company that is not wholly owned is J. Aron & Company (Singapore) PTE.

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STATEMENT OF THE CASE

A. Factual and Procedural Background

Following his discharge from employment by Goldman, Sachs & Co., petitioner sued Goldman Sachs and respondent, a wholly owned affiliate of Goldman Sachs, under RICO and for fraudulent misrepresentation. He subsequently dismissed his claims against Goldman Sachs with prejudice.

Petitioner alleges that Goldman Sachs, after assuring him and its customers that it would not do so, pressed him to divulge confidential information to respondent about customer trading in energy futures, supposedly to enable respondent, which traded for its own account, to benefit at the customers' expense. He admits that no such breach of customer confidences ever occurred. (A-12).

In crafting his RICO claims, petitioner did not allege that the assurances given to him in person violated the mail or wire fraud statutes. Instead, he contends that the assurances made to the *customers* of Goldman Sachs through the use of the mails or wires were predicate acts in furtherance of a racketeering scheme to defraud *him* into foregoing other, unspecified employment opportunities and remaining at Goldman Sachs. (Complaint, ¶¶ 18, 67). He also asserts that, because he refused to provide respondent with confidential customer information, he received a "meager" raise, had his pay cut and was finally discharged, in violation of the Hobbs Act. (¶¶ 23, 27, 28).

B. The Decisions Below

The district court (Leonard Sand, J.) rejected petitioner's attempt to circumvent the settled law of the Second Circuit (and elsewhere) holding that employees discharged for refusing to participate in a scheme directed at others cannot sue under RICO. (A-12-A-13). According to the court: "[I]t is clear that plaintiff's creative pleading simply cannot disguise the fact that the intended victims of the alleged scheme to defraud and attempted extortion were Goldman's clients, and that any injury Haviland suffered resulted from his refusal to accede to the scheme rather than the racketeering activity itself." (A-16-A-17).

In an unpublished order, the Second Circuit "affirmed substantially for the reasons" in the district court's decision and found "unpersuasive" petitioner's "efforts to distinguish" dispositive precedent. (A-2).

SUMMARY OF ARGUMENT

Petitioner seeks to invoke this Court's plenary jurisdiction to the end of "federalizing" under RICO a vast body of employment law long the province of the States. The end is a mistaken one and does not warrant plenary consideration.

The Court declined last Term to consider the supposed conflict among the circuits regarding the necessity of tracing RICO injury to a predicate act—as opposed to any overt act that furthers a conspiracy—in an action brought under 18 U.S.C. § 1962(d). *See Reddy* v. *Litton Indus., Inc.*, 112 S. Ct. 332 (1991). This case does not provide a suitable occasion for revisiting that decision: Petitioner did not present the conspiracy issue to the court of appeals, the court of appeals did not address it, and the unpublished order issued by the court of appeals is without precedential authority.

The second issue presented does not warrant plenary review because the ruling below that petitioner lacked standing under 18 U.S.C. § 1962(c) to sue for collateral injuries arising from an alleged scheme directed at others is in full accord with this Court's decision in *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992), and the decisions of all the circuits (see cases cited at page 8, *infra*). Petitioner's real attack is not on the court of appeals' articulation of the law but on its application of the law to the allegations of his complaint. The court of appeals' rejection of petitioner's pleading sophistry presents no issue for this Court.

ARGUMENT

I.

NO RICO CONSPIRACY CLAIM WAS RAISED IN THE COURT OF APPEALS OR DETERMINED BY ITS UNPUBLISHED ORDER.

From the start, this case has been concerned solely with petitioner's substantive RICO claim under section 1962(c)—the second question presented here. While petitioner referred briefly in a footnote in his district court brief to his § 1962(d) RICO conspiracy claim, he did not raise that claim in the court of appeals.

This Court's "normal practice" is to "refrain from addressing issues not raised in the Court of Appeals." *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted); *see, e.g.*, *IRS* v. *Federal Labor Relations Auth.*, 494 U.S. 922, 933 (1990); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982). Moreover, this case was decided below in an unpublished order, a procedure used by the Second Circuit when "no jurisprudential purpose would be served by a written opinion." Second Circuit Rule § 0.23. Such orders "shall not be cited or otherwise used in unrelated cases before [the Second Circuit] or any other court." *Id.* This decisional posture makes even less warranted a departure from this Court's "normal practice" of refusing to review an issue not raised below.

In addition to the deficiencies of this case as a vehicle for review of the same section 1962(d) issue that the Court declined to review last Term in *Reddy* v. *Litton Indus., Inc.*,

112 S. Ct. 332 (1991), other considerations counsel against review at this time:

1. The First, Second, Eighth and Ninth Circuits have all held that an injury from a RICO predicate act is the *sine qua non* for standing to pursue a claim for alleged RICO conspiracy under section 1964(d). *See Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990); *Bowman* v. *Western Auto Supply Co.*, 985 F.2d 383, 387 (8th Cir. 1993); *Reddy* v. *Litton Indus., Inc.*, 912 F.2d 291, 294-95 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 332 (1991).

The Second Circuit ruled in *Hecht* that "Congress did not deploy RICO as an instrument against all unlawful acts. It targeted only predicate acts catalogued under section 1961(1)." 897 F.2d at 25. "Because the overt act of Hecht's discharge was not a section 1961(1) predicate act, his loss of employment does not confer civil standing." *Id.* In *Miranda*, the First Circuit similarly reasoned that because "Congress painstakingly enumerated a complete list of predicate acts," allowing plaintiffs to sue for other acts simply by alleging a conspiracy "would be tantamount to rewriting the statute." 948 F.2d at 48.

This majority view is supported by Fifth and Eleventh Circuit decisions that, although not focusing on section 1962(d) standing separately from other 1962 subsections, have dismissed section 1962(d) conspiracy claims on the ground that employees who are discharged for failing to participate in an alleged RICO violation cannot bring a RICO claim for loss of employment. *See Cullom* v. *Hibernia Nat'l Bank*, 859 F.2d 1211, 1213, 1217 (5th Cir. 1988); *Morast* v. *Lance*, 807 F.2d 926, 932-33 (11th Cir. 1987).

Against this authority in six other circuits, the Third and Seventh Circuits have held that a RICO conspiracy claim need not rest on injury from a RICO predicate act. *See Schiffels* v. *Kemper Financial Services, Inc.*, 978 F.2d 344, 348-51 (7th Cir. 1992); *Shearin* v. *E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-70 (3d Cir. 1989). But *Shearin* antedates, and *Schiffels* fails to appreciate fully the significance of, this Court's decision in *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992).

The Eighth Circuit, in recently rejecting the Third and Seventh Circuit's approach to RICO standing, stressed that *Holmes* "has imposed limitations on standing by rejecting a but-for causation requirement and applying a more restrictive proximate causation requirement between the injury and the harm alleged." *Bowman* v. *Western Auto Supply*, 985 F.2d at 387. Thus, the Eighth Circuit held that "[i]mposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute." *Id.*

Moreover, the considerations supporting the majority view were recently reinforced by this Court's consideration of RICO's "liberal construction" clause in *Reves* v. *Ernst & Young*, 61 U.S.L.W. 4207 at 4211 (Mar. 2, 1993) (clause "is not an invitation to apply RICO to new purposes that Congress never intended"). The Court in *Reves* plainly undermines the Seventh Circuit's position in *Schiffels* that "limit[ing] standing to sue for RICO conspiracy only to those injured by predicate acts [is] inconsistent with [the 'liberal construction' clause]." 978 F.2d at 350. *See also Shearin*, 885 F.2d at 1170 (same).

2. This case is distinguishable from *Schiffels* and *Shearin*. In those cases, the plaintiffs alleged that they were

"fired to prevent . . . the conspiracy [from] unravel[ing]." *Schiffels*, 978 F.2d at 351; *see Shearin*, 885 F.2d at 1168 (plaintiff "claims that she was fired to preserve [ongoing] fraud when she stated that she would not participate"). Here, on the other hand, petitioner was allegedly fired "simply to retaliate for his refusal to go along." *Schiffels*, 978 F.2d at 351; *see* Complaint, ¶ 28. The complaint does not allege that he was fired to preserve an *ongoing* fraud, since it concedes that no confidential customer information was ever misused.

3. Petitioner's RICO "conspiracy" claim—directed at two parts of a single firm—was not framed with any particularity. The complaint alleges, without more, that "[d]efendants conspired, in violation of 18 U.S.C. § 1962(d) to violate § 1962(c), because they each agreed to participate in the Goldman/Aron Enterprise by agreeing to commit two acts of racketeering as set forth above." (Complaint, ¶ 75). A RICO conspiracy claim alleged in wholly conclusory terms cannot overcome a motion to dismiss. *See*, *e.g.*, *Miranda*, 948 F.2d at 48; *Hecht*, 897 F.2d at 25-26; *Rose* v. *Bartle*, 871 F.2d 331, 366 (3d Cir. 1989).

II.

THE SECOND CIRCUIT'S HOLDING ON RICO STANDING UNDER SECTION 1962(c) IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS.

The second question put forward in the petition—which was the sole focus of petitioner's complaint and his papers below—is patently unworthy of review. In keeping with *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992), the law in the Second Circuit and elsewhere is

clear: Employees discharged for refusing to participate in, or for "blowing the whistle" on, an allegedly fraudulent scheme *directed at others* do not have standing to bring a RICO claim under section 1962(c). *See, e.g., Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990); *Bowman* v. *Western Auto Supply Co.*, 985 F.2d 383, 384 (8th Cir. 1993) ("circuit courts . . . are in agreement that an employee discharged for criticizing or refusing to participate in the employer's racketeering activity lacks standing to bring a civil suit when the underlying violation is based on section 1962(a)-(c) of RICO"); *Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 47 (1st Cir. 1991); *Reddy* v. *Litton Indus., Inc.*, 912 F.2d 291, 295 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1332 (1991); *Kramer* v. *Bachan Aerospace Corp.*, 912 F.2d 151, 155 (6th Cir. 1990); *O'Malley* v. *O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Shearin* v. *E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1167-68 (3d Cir. 1989); *Cullom* v. *Hibernia Nat'l Bank*, 859 F.2d 1211, 1218 (5th Cir. 1988).

While not disputing this overwhelming authority, petitioner claims that "none of these cases involved claims similar to those made by Haviland, *i.e.*, that he was the intended victim of defendant's racketeering." (Pet. at 17). In fact, in those cases plaintiffs argued in one way or another that their discharge was part of or required by the alleged racketeering scheme. Moreover, the cases all make clear that, if the *facts* alleged by plaintiff show that the purported scheme was ultimately *directed* at persons or entities other than plaintiff, no amount of conclusory pleading can save the complaint. Here, petitioner fatally concedes that respondent's "ultimate goal was surely to defraud Goldman's customers by secretly obtaining Haviland's confidential information." (Pet. at 18).

In an effort to show that his discharge was the direct result of a RICO violation, petitioner contends that respondent's alleged "goal could only have been accomplished by first succeeding in the plan (a) to defraud Haviland into staying at Goldman and (b) then extorting him into participating in planned illegal activity." (Pet. at 18). While petitioner alleges what are in effect "sub-schemes" directed against him, his complaint is still no different from those in which other discharged employees have sought—unsuccessfully—to bring RICO claims against their former employers. Indeed, he alleges that he was discharged "[a]s a result" of his refusal to join in the fraudulent scheme *directed* at Goldman Sachs' customers. (Complaint, ¶ 28). The courts of appeals have consistently refused to allow ex-employees to bring RICO actions based on allegations that they were victims of sub-schemes that were part of broader schemes directed at others. *See*, *e.g.*, *Miranda* v. *Ponce Federal Bank*, 948 F.2d at 47; *Hecht*, 897 F.2d at 24; *Shearin*, 885 F.2d at 1167-68.

Petitioner cannot cite a single circuit court decision taking a contrary position. In fact, petitioner chiefly argues that the law of the Second Circuit, as expressed in *Hecht*, was not correctly applied by that court in his case, contending that "application of the standard set forth in cases such as *Hecht* inexorably leads to the conclusion that [he] has standing." (Pet. at 16). His contention—which essentially criticizes the Second Circuit's reading of what petitioner believes is a cleverly crafted and unique pleading—presents nothing for review here.

Moreover, petitioner's two sub-schemes are flimsy, contradictory and inadequate attempts to plead around the uniform law on RICO standing. The complaint does not allege that any of the communications to petitioner or Goldman Sachs' customers during the life of the alleged mail

fraud scheme were misleading. (A-12). His Hobbs Act allegations are also completely inadequate because he cannot allege that respondent extorted property from him. While petitioner claims otherwise (Pet. at 18), the information that respondent and Goldman Sachs purportedly wanted—information about the trading of Goldman Sachs' clients—did not belong to him, but to his employer, Goldman Sachs. *See Carpenter* v. *United States*, 484 U.S. 19, 26 (1987).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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